No. 11,145

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California Corporation, *Appellants,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

OPENING BRIEF FOR APPELLANTS.

STATEMENT REGARDING JURISDICTION.

The United States of America filed the within action against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation of Saint Paul, Minnesota, as surety, and the Livermore Winery, Incorporated, a California Corporation, as principal, to enforce collection of Internal Revenue taxes upon distilled spirits and to enforce collection thereof upon a bond given to guarantee payment of the same.

The complaint (R. 2-22) sets forth two causes of action, wherein it is contended (R. 3 and 7) that the District Court had jurisdiction over the causes of action in accordance with the requirements of Section 3740, Title 26, *United States Code* and by virtue of Section 41, subdivisions 5 and 9 of Title 28, *United States Code*. The first cause of action seeks a recovery of certain taxes alleged to be due from defendant Livermore Winery, Incorporated, based upon the alleged distillation and removal from the distillery premises No. 306 of certain distilled spirits, to-wit, brandy, and that the tax was imposed thereon by Section 1150, Title 26, *United States Code* (1934 Ed.) (R. 5), pursuant to notice and demand therefore. The second cause of action is directed against both defendants and seeks to recover, pursuant to notice therefor, the amount of the tax alleged to be due and payable from the Livermore Winery, Incorporated, under and by virtue of the terms and conditions of a fruit distillers bond (R. 13-20) executed by the defendants as principal and surety thereunder.

The present appeal is from a judgment of the District Court (R. 40-41) based upon findings of fact and conclusions of law (R. 34-39), and this appeal is taken from said judgment to this Court, which has jurisdiction to review said judgment by appeal, in accordance with Section 225(a), Title 28 *United States Code,* Section 128(a) of the Judicial Code.

STATEMENT OF THE CASE.

On December 26, 1936, defendant Livermore Winery, Incorporated, was engaged in the business of manufacturing sweet wines at its winery located at Livermore, California. In this connection, said defendant had caused to be issued the required bonds as a wine maker and as a fruit distiller, in compliance with federal law, covering its operations of a (1) distillery, (2) distillery warehouse (used for storage of brandy and use in the fortification of wine), and (3) a winery.

This action was instituted by the United States of America only upon the fruit distillers bond given by said defendant, as principal, and the defendant The Saint Paul Mercury-Indemnity Company of Saint Paul, as surety, whereunder said parties agreed to pay all taxes due and payable upon distilled spirits produced by the principal at the distillery during a period of one year from June 26, 1936 to April 30, 1937 at the rate imposed by law. The complaint sets forth two causes of action, the first against the defendant winery and the second against both defendants under the bond.

Under the first cause of action, and as realleged in the second cause of action, plaintiff alleged that said defendant winery distilled 1619.56 proof gallons of distilled spirits during the month of December, 1936, and *"removed"* said distilled spirits, to-wit, brandy, from the premises of Fruit Distillery No. 306, at which time the tax imposed thereon under Section 1150, Title 26, *United States Code* (1934 Ed.) *"thereby be-*

came due and payable", (R. 5) which allegation is denied by the defendants (R. 23), as is plaintiff's allegation (R. 5-7) that "*in compliance with law*, the Commissioner of Internal Revenue on April 23, 1937, *levied and assessed the tax* upon said distilled spirits so removed from said distillery premises" (R. 23); also, that defendant winery alleges as an affirmative defense, that it has paid all taxes legally levied and assessed on and against said defendant upon any and all distilled spirits distilled at the Fruit Distillery No. 306 and removed therefrom (R. 25-26), and defendants alleged further that they are not indebted to plaintiff in any sum whatsoever (R. 26) by reason of the alleged manufacture of said brandy or under the said fruit distillers bond.

Defendants set forth affirmatively (R. 26-33) that said distilled spirits, upon which the tax is sought to be collected, were never "removed" from Fruit Distillery No. 306; hence, the tax imposed, levied and assessed against defendant winery never became due or payable (R. 26); also, that a certain quantity of distilled spirits, believed to be the amount of 1619.56 proof gallons, were produced and lost by reason of the mixing of water with an unknown quantity of distilled spirits manufactured and placed in a receiving tank *in the Fruit Distillery No. 306;* that said loss was occasioned by and was a casualty that occurred without any fraud, collusion or negligence of the owner thereof, namely, defendant winery; hence, under the provisions of Section 2901(b) of the *Internal Revenue Code,* 1939, U.S.C.A., Title 26, defendant

winery was entitled to have any tax assessed or imposed upon said distilled spirits abated, or refunded, if paid. In this connection, reference is made to Section 3031 of the *Internal Revenue Code,* 1939, U.S.C.A., Title 26 distinguishing between a "distillery", "fortification room", "bonded warehouse", and a "winery", as well as between an owner of distilled spirits or wine as an individual, or his agents; also, setting forth (R. 32) that neither of said defendants have ever been indemnified or recompensed for such loss suffered by defendants, as required under said statutes as a prerequisite to remission or refund of any tax otherwise due.

Defendants allege (R. 26-29), as an affirmative defense to the instant action: That without the knowledge or consent of defendant winery, a person unknown, caused a hose to be connected to and with the Livermore city water system on said distillery premises, and then to be joined and connected to an unsealed faucet, the existence of which was unknown to defendant and which unsealed faucet had been installed without the knowledge or consent of defendant, in and on the distilling material line connected with the still on said distillery premises; that thereafter a faucet was turned on by persons unknown to defendant, and without the knowledge of defendant, so that said water from the Livermore city water system was caused to flow through said hose into the distilling material line, and then into a still located in Fruit Distillery No. 306, and which still was connected with Receiving Tank No. 2 in said distillery premises;

that thereafter the still filled with water so as to cause the water therein to overflow through the vapor line, condenser and trybox and into Receiving Tank No. 2, in which an unknown quantity of distilled spirits or brandy had previously been placed; that said water flowing into Receiving Tank No. 2, as aforesaid, caused said tank to become completely filled with water and brandy so as to cause the same to and it *did overflow upon and in the premises known as Fruit Distillery No. 306, and not elsewhere.*

That at no time prior to the overflowing of Receiving Tank No. 2, as aforesaid, had said distilled spirits therein been gauged as to quantity, proof, or gallonage;

That thereafter, an employee of plaintiff gauged and tested the brandy and water remaining in Receiving Tank No. 2 and concluded therefrom and on a hearsay statement submitted to plaintiff's said employee, by a person or persons unknown, that approximately the sum of 1619.56 proof gallons of brandy previously distilled had been lost by reason of the overflowing of Receiving Tank No. 2 occasioned by the running of water therein;

That in the belief that said sum of 1619.56 proof gallons represented a determined and fixed, rather than an estimated, loss occasioned by the overflowing of the water and brandy out of and from Receiving Tank No. 2, defendant, Livermore Winery, Incorporated, erroneously reported to plaintiff the production of the aforesaid sum of 1619.56 proof gallons

of brandy and the resulting loss thereof, when in fact there has never been ascertained and determined to date the actual quantity, or proof gallons, of distilled spirits, to-wit, brandy, actually produced on December 26, 1936, or the alleged loss thereafter on said date and on December 27, 1936;

That defendant cannot ascertain and does not know how much, if any, proof gallons of brandy were produced and lost by reason of the overflowing of Receiving Tank No. 2, as aforesaid; and,

That thereafter an unknown quantity of the distilled spirits contained in the water that had overflowed from Receiving Tank No. 2 was recaptured in Fruit Distillery No. 306 and was thereafter redistilled and all taxes due and payable thereon were paid in the form and manner provided by law following the removal of said brandy from Fruit Distillery No. 306.

Upon the trial of the case, the District Court judge, over the repeated objections and motions to strike of defendants permitted plaintiff to introduce hearsay evidence and exhibits without proper foundation having first been laid therefor and authorized the introduction into evidence of photostatic copies of alleged documents without proper foundation having first been laid therefor, or proof that they were exact photostatic reproductions of original exhibits; also, said District Court judge permitted the introduction into evidence of notices which were admittedly not copies of the original notices, without proper foundation having first been laid therefor or demand made for the production of the original notices.

Upon the submission of the case, the District Court judge denied the defendants' motion to set aside the judgment (R. 41-49) so as to allow defendants the opportunity of presenting objections to the findings of fact and conclusions of law theretofore prepared by the attorney for plaintiff and allegedly mailed by said attorney to defendants' attorney but never received by defendants' attorney.

SPECIFICATION OF ERRORS.

The errors relied upon in this appeal are those set forth in the statement of points on which appellants intend to rely (R. 57-61) as follows:

The District Court erred:

(1) In that the facts found by the trial Court do not support its conclusions of law;

(2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;

(3) In impliedly finding that there was removed on December 26 and December 27, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, at Livermore, California, 1619.56 proof gallons of brandy. There is no evidence to support such finding.

(4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding Number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,010.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 proof gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is no evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence December 26 and 27, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4 and May 15, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of $2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of $3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26 and 27, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in the sum of $3,239.00, together with a penalty of 5% thereon in the amount of $161.95, and interest on the said $3,239.00 at the rate of 6% per annum from May 4, 1937, to date hereof in the sum of $1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made

or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection, Plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and Plaintiff's Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendant's objection, Plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection, Plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, President of Livermore Winery, Incorporated, and overruling defendants' objection to the admission of said exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants' objection, an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, located on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection, testimony of Mr. Bulfinch relating to his

calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record Plaintiff's Exhibit Nos. 1, 4, 5, 6 and 7.

SUMMARY OF ARGUMENT.

I. That the distilled spirits upon which the tax was imposed, to-wit, brandy, was never "removed" from the distillery premises; hence no tax became due and payable.

II. That all taxes due and payable upon all distilled spirits "removed" from the distillery premises were paid.

III. That any tax, otherwise due and payable, must be abated or refunded as the loss of the distilled spirits was in and on the distillery premises, and even if removed therefrom, must be abated because occasioned by a casualty without any fraud, collusion or negligence of the owner thereof.

IV. That a compliance with law, in connection with the levy and assessment of the alleged tax, was not established.

V. That the quantity of distilled spirits produced, upon which the tax was assessed, was not established.

VI. That the District Court erred in admitting exhibits without proper foundation having first been established therefor.

VII. That the District Court erred in refusing to order the production of the distillery plans for the purpose of cross-examination of a witness who had testified regarding the operation of the distillery included therein.

VIII. That the District Court erred in admitting hearsay evidence which was no part of the *res gestae.*

IX. That, as the information contained in Plaintiff's Exhibit No. 4 was established to have been based upon incorrect information supplied by plaintiff, it was error for the District Court to admit such exhibit in evidence.

ARGUMENT.

I.

THAT THE DISTILLED SPIRITS UPON WHICH THE TAX WAS IMPOSED, TO-WIT, BRANDY WAS NEVER "REMOVED" FROM THE DISTILLERY PREMISES; HENCE NO TAX BECAME DUE AND PAYABLE.

Under Chapter 26, subchapter A, Part I, Section 2800(a) of the *Internal Revenue Code,* a tax on all distilled spirits in bond or produced in or imported into the United States at the rate therein provided is authorized to be levied and collected thereon "to be paid by the distiller or importer when withdrawn from bond". Said law provides further (Sec. 2800(b) (1)) that the "time" for payment of the tax on bonded distilled spirits is covered by the above Section 2800(a) (1).

In the event the distilled spirits are not bonded, the statute (Sec. 2800(b) (2)) provides as follows:

> "The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 3312, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law."

Further, Chapter 26, Part IV, Sec. 2900 provides:

> "General Rule.—All distilled spirits entered prior to July 26, 1936, for deposit in a distillery, general, or special bonded warehouse, or after such date entered for deposit in an internal revenue bonded warehouse, shall be withdrawn therefrom within eight years from the date of original entry therein, except as provided in subsection (b) of this section."
>
> "Exception.—Distilled spirits which on July 26, 1936, are eight years of age, or older, and which are in bonded warehouses, may remain therein after such date; but no allowance for loss by leakage or evaporation shall be made in the case of such spirits with respect to any period after such date: *Provided,* That loss allowances for such spirits for the period prior to July 26, 1936, shall be made pursuant to the provisions of the Act of February 6, 1925, c. 143, 43 Stat. 808."

Consequently, where, as in this case, the evidence discloses (R. 118, 119, 167) that the distilled spirits, to-wit, brandy, alleged to have been removed from the premises of Fruit Distillery No. 306 (R. 5-7) were never removed therefrom, no tax thereon became due and payable nor did the Collector of Internal Revenue have any right to levy and assess any tax thereon.

If the distilled spirits lost had remained in the distillery and had not been withdrawn within eight years from the date of the original entry therein, then a tax would have become due and payable thereon, but such condition does not prevail here, in

that it is contended that the distilled spirits sought to be taxed were "removed" from the premises and the tax thereon thereby became due and payable, which contention is denied by defendants.

Moreover, the attention of defendants has not been directed to any case heretofore decided by any Court, involving this point at issue herein. In all cases involving the question as to whether a tax was due and payable under the above law by reason of a "removal" of distilled spirits from the distillery premises, or from a distillery warehouse, or fortification room or winery premises, it was established that the process of manufacture of the distilled spirits had been completed, the quantity distilled had been established by gauging or there had been a conscious removal of the distilled spirits therefrom, so that a compliance with the provisions of the above statutes was established; hence, as the distilled spirits were "removed" therefrom the tax became due and payable and it was proper for the Collector of Internal Revenue to assess and levy a tax thereon.

In the instant case, there is no evidence of any "removal" of the distilled spirits from the distillery to any other place, such as a distillery, warehouse, fortification or cistern room, or to winery premises after fortification of wine.

II.

THAT ALL TAXES DUE AND PAYABLE UPON ALL DISTILLED SPIRITS "REMOVED" FROM THE DISTILLERY PREMISES WERE PAID.

Defendants contend (R. 25, 32) that all taxes due and payable upon all distilled spirits "removed" from the distillery premises were paid and deny that they are indebted to plaintiff in any sum whatsoever, which denial is not controverted nor was evidence introduced to refute this denial of indebtedness.

Unlike the usual tax case, where the taxpayer must prove his right to recover a tax paid from the government, in this case, as the government seeks to recover a tax alleged to be due from the defendants, as principal and surety respectively, the government must *prove,* by sufficient evidence, legally admissible and legally admitted in evidence, that the tax sought to be collected is due and payable; in other words, the government plaintiff, rather than the taxpayer and his surety, have the burden of proof and must prove its case.

> *Freeman v. U. S.,* 1907, 157 Fed. 195;
> *U. S. v. Sisk,* 176 Fed. 885;
> *U. S. v. Rindskopf,* 105 U. S. 418, 26 L. Ed. 1131.

Consequently, it was incumbent upon plaintiff to show and prove that all of the alleged facts, not admitted in the amended answer or by oral stipulation were true.

Therefore, the burden was upon plaintiff to establish that the alleged quantity of distilled spirits, or a

lesser or greater sum, or none at all, was distilled at the time and place mentioned; also, that such distilled spirits were removed from the distillery in the quantity alleged on the date stated, and that there was a tax due thereon, in the amount alleged, or other sum, which tax or taxes were then due and payable; further, that the tax levied and assessed was so levied and assessed "in compliance with law".

It is submitted that the trial record establishes clearly the failure of plaintiff to sustain this burden of proof; hence, defendants were entitled to have judgment entered in their favor.

III.

THAT ANY TAX, OTHERWISE DUE AND PAYABLE, MUST BE ABATED OR REFUNDED AS THE LOSS OF THE DISTILLED SPIRITS WAS IN AND ON THE DISTILLERY PREMISES, AND EVEN IF REMOVED THEREFROM, MUST BE ABATED BECAUSE OCCASIONED BY A CASUALTY WITHOUT ANY FRAUD, COLLUSION OR NEGLIGENCE OF THE OWNER THEREOF.

Assuming for purposes of argument only, but not granting, that the distilled spirits, in the quantity alleged in the complaint, was "removed" from the distillery, then, in the absence of evidence establishing that such "removal" was not occasioned by a casualty and did occur through fraud, collusion or negligence of the owner thereof, defendants were entitled to judgment, in view of the express provisions of Chapter 26, of the *Internal Revenue Code,* Section 2901(b) which reads as follows:

> "Accidental Fire or Other Casualty.—The Secretary, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use while stored in the fortifying room on the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated."

which statute was set forth as an affirmative defense (R. 25-32) in defendants' amended answer to plaintiff's causes of action wherein defendants alleged (R. 32) that neither had been indemnified or recompensed for such loss to date from any persons whomsoever.

In order to clearly interpret the above statute it should be read in connection with the entire statute of which it is but a part, namely, Chapter 26 of the *Internal Revenue Code,* wherein, under other sections of the same statute, a distinction is made between an "owner" (Sec. 2901(b), 2903, 2874, 2885, 3180) or a "person legally accountable" (Sec. 2901(c)), a "wine

maker or his agent" (Sec. 3031(b)), a "distiller or importer" (Sec. 2800(a) (1)); a "rectifier or other dealer" (Sec. 2801(b)), a "distiller or rectifier" (Sec. 2812, 2828); a "person" (Sec. 2803, 2806, 2809, 2810, 2811, 2818, 2819, 2821, 2842, 2843, 2856, 2867-2870, 2876, 2885, 2908, 2909, 2913, 3072, 3100); a "rectifier" (Sec. 2813, 2855); a "distiller" (Sec. 2814(a) (2), 2815, 2844, 2845-2851, 2904); a "distiller and person" (Sec. 2816); any "person, firm or corporation" (Sec. 2817, 3152); an "officer, agent or person" (Sec. 2817); an "owner, agent or superintendent" (Sec. 2820, 3150(b) (1), 3157, 3159); a "distiller or his workmen or any person in his employ" (Sec. 2827); a "distiller, rectifier or wholesale liquor dealer and every person who works in any distillery, rectifying establishment or wholesale liquor store" (Sec. 2831); "distiller or person employed" (Sec. 2838); "agent or owner" (Sec. 2841); a "rectifier and wholesale liquor dealer" (Sec. 2854, 2857); a "distiller as a wholesale dealer" (Sec. 2859); a "rectifier or wholesale or retail liquor dealer" (Sec. 2860); a "rectifier or wholesale liquor dealer" (Sec. 2865); a "railroad company, transportation company or person" (Sec. 2866); "owner or owners" (Sec. 2886); "exporter or owner" (Sec. 2886); "distiller, owner, exporter, carrier or their agents or employees" (Sec. 2889, 2891); "distiller or warehouse man" (Sec. 2901); "distiller or owner" (Sec. 2903); "producer" (Sec. 3030, 3031, 3033, 3040); "wine maker or his agents" (Sec. 3031(b) (1)); "wine maker" (Sec. 3035); "distiller, manufacturer, dealer and all other

persons" (Sec. 3070); "manufacturer" (Sec. 3073, 3114, 3177, 3179); "no one" (Sec. 3114); "consignee, agent or employee" (Sec. 3114(d)); "whoever" (Sec. 3115); "commissioner, his assistants, agents and inspectors" (Sec. 3117); "commissioner, assistants, agents, inspectors and all other officers, employees and agents" (Sec. 3121); "brewer, seller and purchaser" (Sec. 3150(b) (2)); "brewer" (Sec. 3153, 3154, 3155, 3158); "retail dealer or other person" (Sec. 3159(f)); "person other than the purchaser or owner, or person acting on his behalf or his agent" (Sec. 3159(i)); "commissioner, his assistants, agents or employees" (Sec. 3170); "exporter" (Sec. 3179).

It is apparent from the foregoing terms used in the statute relating to liquor that Congress intended to distinguish between these individuals and to confine the use of the terms to their ordinarily accepted meaning; otherwise, in this same statute (Sec. 3173(b) (4)), they have specifically defined the term as used in the specific section of the statute, wherein the statute provides—

> "The term 'person' as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

An "owner" is one who has the legal title, or right to possession of a thing. This is the common accepted definition of the word. The term "owner", in view of qualifying terms used in other sections of the same

statute, cannot be held to include "agents" and "employees", nor can their negligence be imputed to the "*owner*".

It must be remembered that this statute was a remedial statute designed and intended to give relief to an "*owner*". Had Congress desired to restrict the remedy or relief afforded under the statute, it could have done so, as it did in other sections of the same statute.

In construing any statute, reference must be made to the entire statute rather than to a particular provision or paragraph thereof, in order that the full intention and purpose of a statute may be properly determined and construed. *U. S. v. 99 Diamonds,* 129 Fed. 961, 965; 72 C.C.A. 9, 13; 2 L.R.A. (N.S.) 185.

Consequently, as Section 3221 of the Revised Statutes, as amended, otherwise known as Section 2901 of the U.S.C.A. Title 26, is but one part of said statute, reference must be made to the entire statute in order to ascertain whether the word "owner" is intended to include any person other than the one having title or possession of a thing.

That the word "owner" is intended to mean only the one who has the legal title or right to possession of a thing is self-evident by referring to other sections of this particular statute.

For example, Section 2889 authorizes an allowance to be made "for leakage or loss by an unavoidable accident and without any fraud or negligence of the *distiller, owner, exporter,* or their *agents* and *em-*

ployees occurring during transportation from an Internal Revenue Bonded Warehouse to the Port of Export, nor shall any assessment be collected for such loss or leakage."

Further, under Section 2891(b) of the *Internal Revenue Code,* "Where spirits are withdrawn from warehouses, under the provisions of this chapter, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the Commissioner, with the approval of the Secretary, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the *distiller, owner, exporter, carrier,* or their *agents* or *employees*, occurring during transportation from an internal revenue bonded warehouse to a manufacturing warehouse."

It would be illogical to conclude otherwise than that Congress intended to use the word "owner" in its restricted, rather than in its general sense, by the use of qualifying terms in the foregoing provisions of the same statute.

In using the words "distiller", "owner", "exporter", "carrier", "winemaker" or "person legally accountable" or their "agents or employees", separately and together, Congress must have intended each word or group of such words to have a special meaning. And having referred to these individuals specifically, in several instances, and having included their agents or employees therein in one case and not in another in the same statute, it is obvious that it would be a strained construction of the statute to hold

that the negligence of an agent or employee can be imputed to an owner in one paragraph of the statute where the term "owner" is not modified by the phrase used in other sections of the statute, namely "or his agents and employees".

Had Congress intended to impute the negligence of an employee or agent to the owner, it could and would have said so as it did in the other sections in the statute referred to.

It must be remembered that this statute is a remedial statute and that it is intended to relieve a particular person from a burden to which he is otherwise subject.

Therefore, if there is no fraud, collusion or negligence on the part of the *owner*, and as the loss resulted from a *casualty*, the owner is entitled to allowance and deduction regardless of any negligence of any of his agents or employees, so long as the owner did not knowingly and actively participate in the wrongdoing. Had such been the case, then such fraud or collusion would prevent a recovery on the part of the owner.

Casualty.

Generally speaking, unless otherwise restricted specifically, a "casualty" is that which happens without design or without being foreseen. 129 Ky. 477, 112 S.W. 602.

The term "casualty" when used generally, without restriction, in statutes has been held to include *per-*

sonal illness and *automobile accidents* even though caused by intentional or negligent personal act.

For example, under the Hours of Service Act, it was held by the Court, in *United States v. Delano,* 1917, 246 Fed. 107, that the illness of an employee, even if resulting from over-indulgence due to the voluntary act and participation therein of the employee, was a "casualty".

Likewise, under the Revenue Act of 1934, authorizing an income tax deduction for losses arising from fires, storms, shipwreck or other *casualty,* it has been held that an automobile accident is a "casualty" within the meaning of such income tax statute. Revenue Act of 1934, paragraph 23(e) (3), 26 U.S.C.A. paragraph 23(E) (3) *Helvering v. Owens,* C.C.A. 2, 95 Fed. (2d) 318, 319.

The word "casualty" according to the Century Dictionary, means, "happening or coming to pass without apparent cause, without design on the part of the agent, in an unaccountable manner, or as a mere coincidence or accident; coming by chance; accident; fortuitous; indeterminate, as a casual encounter.

The foregoing definition is quoted with approval by the Court in *United States v. New York O. & W. Railway Co.,* 1914, 216 Fed. 702, 705. The Court then states:

> " 'Casualty' is defined by the same authority as 'chance or whatever happens by chance, accident, contingency'. An unfortunate chance or accident, expecially one resulting in bodily injuries or death. Specifically, disability or loss of life in battle or military service wounds" etc.

Black's Law Dictionary defines a "casualty" as "change; accident; contingency; also that which comes without design or without being foreseen." *Morris & Co. v. Industrial Board of Illinois,* 284 Ill. 67, 119 N.E. 944, L.R.A. 1918 E, 919; *Bennett v. Howard,* 175 Ky. 797; 195 S.W. 117, 118, L.R.A. 1917 E, 1075.

Webster's International Dictionary Second Edition, Unabridged, 1934, defines "casualty" as "(1) chance; accident, contingency; also that which comes without design or without being foreseen; an accident; losses that befall them by mere casualty. Raleigh;" (2) An unfortunate occurrence; a mischance; a mishap; a serious or fatal accident, a disaster".

This same authority defines "mishap" as "(1) ill luck, misfortune; (2) an injurious or unfortunate accident". The synonym "misfortune" is defined as "To happen unluckily or unfortunately; to suffer misfortune." "Misfortune" is defined further as "(1) Bad fortune or luck; calamity; an evil accident; disaster; mishap; mischance." "Accident" is defined by this same authority, as "an event that takes place without one's foresight or expectation; an undesigned, strange and unexpected event. Hence, often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a *casualty*".

According to Funk & Wagnalls Practical Standard Dictionary, a "casualty" is "A contingency or accident, especially a harmful accident; also a chance occurrence; in war, losses arising from any cause."

This authority defines "casualty" as occurring by chance, accidental, unusual, occurring at irregular intervals or occasional.

In *Easton v. Glendeman,* 33 Idaho, 389, 195 Pac. 90, 91, the Court states:

> "Casualty is a word of quite frequent use; yet, it cannot be said that its definition has been very accurately settled by the Courts. It has been said that strictly and literally the word 'casualty' is limited to injuries which arise solely from accidents, without any element of *conscious* human design or *intentional* human agency; something not to be foreseen or guarded against, *something that happens not in the usual course of events.* The word "casualty" being synonymous with accident; an accident."

Under the Hours of Service Act, certain penalties are imposed for violation of the provisions of the Act, unless such acts fall within an exception thereto which provides

> "provided that the provisions of the Act shall not apply in any case of *casualty* or unavoidable accident or an Act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal and could not have foreseen". *U. S. v. Penn Co.,* 1917, 239 Fed. 741.

In considering the meaning of the word "casualty" the Court says:

> "It should not be assumed that any terms used by Congress in the proviso are synonymous."

"All words of an Act have a proper place and meaning therein, unless the contrary plainly appears."

"In the proviso under consideration 'casualty' means a fortuitous happening caused by some human agency which the carrier cannot control.

" 'Unavoidable' accident means a fortuitous happening caused by some human agency over which the carrier may have some control, yet which could not have been prevented by the exercise of due care.

"*Words of the proviso do not plainly express such intention. If thus intended, Congress would have expressed such meaning in no uncertain terms* * * *".

As indicated in the *Helvering v. Owens* case, ante, and as expressly stated in *United States v. Delano,* 1917, 246 Fed. 107, a "casualty" may arise even though the human agency participated therein by his own action and conduct.

It is apparent, from the foregoing definitions and decisions, that the loss of the brandy in the instant case was due to a "casualty" arising out of an accident which came without design or without being foreseen and that the event took place without foresight or expectation, being an unforeseen, and unexpected event of an unfortunate character resulting in injury and damage to a thing, in short, an injury resulted which arose solely from an accident without any element of conscious human design or intentional human agency.

"Casualty", within the meaning of the *Internal Revenue Law,* authorizing the deduction of such loss in computing net income, means an event due to accident, unexpected or an unusual cause, *Matthewson v. Com. of Int. Rev.* 1931, 54 Fed. 201, 537.

"The term 'casualty' expresses the measure rather than the cause of damage, that is the wreck itself rather than the storm, or negligence or fault of some person, so the 'other' casualty is at least as clearly *ejusdem generis* with shipwreck as with fire or storm", stated the Court in *Shearer v. Anderson,* 16 Fed. (2d) 995.

Construction of tax statutes.

It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers.

> *Burnet v. Niagara Falls Brewing Co.,* 282 U.S. 648, 654.

See also, *Miller v. Standard Nut Margarine Co.,* 284 U.S. 498, 508, where the Court said in part:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. *Doubts must be resolved against the Government and in favor of the taxpayers*".

Moreover, revenue and tax statutes must be construed strictly.

> *U. S. Wigglesworth,* 2 Story (U.S.) 369, 373;
>
> *Rice v. U. S.,* 53 Fed. 910;

Powers v. Barney, 5 Blatchf. (U.S.) 202, 203;
U. S. v. Watts, 1 Bond (U.S.) 580, 583;
U. S. v. Freed, 225 U.S. 257, 68 L. ed. 617;
Gould v. Gould, 245 U.S. 151;
Ebersole v. McGrath, 271 Fed. 995.

Nor are the provisions of laws imposing taxes to be extended by implication, which rule of law the District Court failed to follow in the instant matter.

Gould v. Gould, ante;
U. S. v. Field, 255 U.S. 257.

Where the language of a tax statute is ambiguous the Court adopts the construction which is most favorable to the taxpayer. Also, if there is any doubt as to the connotation of a term and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer.

Gould v. Gould, ante;
United States v. Merriam, 263 U. S. 179;
Old Colony R. Co. v. Commissioner (1932), 284 U. S. 552;
Bowers v. Lighterage Co., 273 U.S. 346;
United States v. Updike, 281 U.S. 489;
Burnet v. Niagara Falls Brewing Co., ante.

Language used in tax statutes should be read in its ordinary and natural sense.

Helvering v. San Joaquin Co., 297 U.S. 496, 499;
Old Colony R. Co. v. Commissioner, ante.

Congress may well be supposed to have used language in accordance with the common understanding, and words in their known and ordinary signification.

Union Pacific R. Co. v. Hall, 91 U.S. 343, 347;
Old Colony R. Co. v. Commissioner, ante, 560.

The popular or received import of words furnishes the general rule for the interpretation of public laws.

Maillard v. Lawrence, 16 How. 251, 261;
Old Colony R. Co. v. Commissioner, ante;
Woolford Realty Co. v. Rose, 286 U.S. 319, 327;
United States v. Kirby Lumber Co., 284 U.S. 1, 3;
United States v. Buffalo Gas Fuel Co., 172 U.S. 339, 341;
Caminetti v. United States, 242 U.S. 470, 485;
U. S. v. First Nat. Bank, 234 U.S. 245, 258.

Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be engendered by any other ruling.

Woolford Realty Co. v. Rose, ante.

In the interpretation of tax statutes words should be "given their commonly accepted import". Congress may well be supposed to have used language in the popular sense according to common understanding and commercial designation.

United States v. Kirby Lumber Co., ante;
United States v. Buffalo Gas Fuel Co., ante, 341.

As was said in *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370

"the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Old Colony R. Co. v. Commissioner, ante.

In seeking the intent of Congress the first consideration is the natural, ordinary and generally understood meaning of the term used.

United States v. Fisher, 2 Cr. 348;
Lake County v. Rollins, 130 U.S. 662;
Maillard v. Lawrence, ante;
United States v. Pacific Ry. Co., 91 U.S. 72.

The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain, and admits of no more than one meaning the sole function of the Courts is to enforce it according to its terms, as the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Caminetti v. United States, ante;
Lake County v. Rollins, ante, 670, 671;
Hamilton v. Rathbone, 175 U. S. 414, 421.

It is the province of the Court to enforce, not to make the laws; hence the Court is not at liberty to amend the statute or read words into it to make it conform to what the Court may believe to be the spirit of the act or to escape the injustice of law.

Maxwell v. Moore, 22 How. 185;
United States v. Goldenberg, 168 U. S. 95;
Hobbs v. McLean, 117 U. S. 567;

United States v. First Nat. Bank, ante, 245, 260;
St. Louis v. Taylor, 210 U. S. 281;
Caminetti v. U. S., ante.

Where Congress has by apt terms created a class or drawn distinctions between classes of persons (i.e. distiller, producer, etc.) or objects, it is not competent for the Court to extend or limit the operation of the statute.

United States v. Colorado Co., 157 Fed. 321;
United States v. Goldenberg, ante, 102;
Maxwell v. Moore, ante, 191;
Tiger v. Western Inv. Co., 221 U. S. 286.

A dispute over the meaning of a statute does not of itself show an ambiguity in the Act.

Nor. Pac. Ry. Co. v. Sanders, 47 Fed. 610;
Shreve v. Chusman, 69 Fed. 789;
Webber v. St. Paul City Ry. Co., 97 Fed. 140;
Swartz v. Siegel, 117 Fed. 13.

Subsequent experience is no guide to interpretation.

United States v. Un. Pac. Ry. Co., 91 U. S. 72;
Platt v. Pacific Ry. Co., 99 U. S. 48.

Therefore, it is submitted that it is apparent from the entire liquor statute that the term "owner" was intended to refer solely and exclusively to one holding the legal title to the distilled spirits and not to his officers, agents, servants, employees or any other person whomsoever; otherwise, such inclusion would have been made by Congress in such statute.

Moreover, as the burden of proof was upon plaintiff to establish another construction or intention on the

part of Congress so as to include within the definition of the word "owner" the other individuals expressly enumerated in other sections of the same statute, the failure of plaintiff to do so entitles defendants to the construction of the term "owner" defined herein; hence, as there is no evidence of any "fraud, collusion or negligence of the owner" of the distilled spirits, namely, defendant Livermore Winery Incorporated, and as even certain of the exhibits introduced by plaintiff indicate thereon that the loss claimed was due to a "casualty" any tax otherwise due and payable, must be abated and judgment entered in favor of the defendants herein. (Plaintiff's Exhibit 1(b), R. 112.)

IV.

THAT A COMPLIANCE WITH LAW, IN CONNECTION WITH THE LEVY AND ASSESSMENT OF THE ALLEGED TAX, WAS NOT ESTABLISHED.

As previously pointed out, there being no "removal" of the distilled spirits, the attempted levy and assessment of the alleged tax was premature and unauthorized under the statutes. Likewise, for reasons that follow, there was no evidence admitted legally upon the trial to sustain the contention of plaintiff that the levy and assessment was "in compliance with law" or the statutes authorizing the same.

In fact, the only witness who testified in this connection impliedly admitted that she did not know the signature of the Commissioner of Internal Revenue in Washington, D. C. (R. 68, 71) by this answer to a

question: "A. Well, it is the signature which our office accepts as being his signature." Further, the District Court over the objection of the defendants, permitted to be introduced in evidence, as Plaintiff's Exhibit No. 5, a purported copy of the assessment certificate, supposedly certified by someone whose signature had not been identified, nor that he was the holder of the office of Commissioner of Internal Revenue at the time of the making of the certification thereon; also, that the said certified copy of the assessment certificate contained but a portion of the assessment list concerning which the witness offered evidence and testimony.

Moreover, in connection with Plaintiff's Exhibit No. 7, being a notice and demand for tax (R. 73-81), the witness answered "no" to the question (R. 80) "But these are not copies of the records that you sent out at the time, and it was not the practice to keep a copy?"; also, "Q. So you cannot testify at this time that these are copies as they purport to be, of the notices that actually were sent out at that time?" "A. No, they are not copies of the original notices."

It is conceded that had there been the foundation laid to establish that the assessment list offered in evidence was signed by the Commissioner of Internal Revenue, who was then duly qualified and acting as such at the time of such signature, and that such was his signature, and that it was on file in the office of the collector of internal revenue, that such original assessment list would be evidence of the assessment. (*U. S. v. Bristow,* C.C. Ky., 1884, 20 F. 378.) However, such

foundation had not been laid at the time that the District Court permitted, over defendants' objection and motion to strike thereafter, the introduction of that which was not even the purported original assessment list, but merely what purported to be a photostatic copy of but a portion of it.

As the laws of evidence of the State of California are applicable in this case, attention is called to Section 1918, subdivision 9, of the California Code of Civil Procedure, which provides that documents of departments of the United States government may be proved by the certificates of the legal custodians thereof. Hence, it is necessary to establish who the legal custodian of the document was before it may be proved, which was not done nor was there any evidence as to who was the legal custodian of the assessment record. The above law authorizing the proving of documents of a department of the United States government must be distinguished from Section 1875 of the California Code of Civil Procedure, which restricts the right of a court in taking judicial notice of the private and official acts of the executive, legislative and judicial departments of the state and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states; and to the accession to office and the official signatures and seals of office of the principal officers of government in the executive, legislative and judicial departments of this state and of the United States. Accession to office may be established by an exemplification of a certificate of election or appointment duly certi-

fied by the keeper of the record. Here we have an appointment to office, rather than an accession to office, hence it was incumbent upon plaintiff to establish by evidence the appointment of the person designated on the assessment list to the office of Commissioner of Internal Revenue and that he held such office at the time of the execution of the assessment list; also, that it was signed by him; none of which was done.

It was error for the District Court to permit the witness for plaintiff to testify regarding the contents of a notice and demand for tax (Plaintiff's Exhibit No 7, R. 72-81) in view of the testimony of the witness that such exhibit was not a copy of the original or a duplicate original copy of the notice and demand for tax.

There can be no evidence of the contents of a writing, other than the writing itself, unless the original has been lost or destroyed, in which case proof of the loss or destruction must be made or when the original is in the possession of the person against whom the evidence is offered and he fails to produce it after reasonable notice. (*C. C. P.,* Sections 1855, 1937, 1938, et seq.)

In connection with Plaintiff's Exhibit No. 5 as the purported original copy of said exhibit bore other accounts and records thereon, including interlineations and penciled notations (R. 72), it was incumbent upon plaintiff to explain such alterations, interlineations, and notations in proffering the writing in evidence prior to its introduction therein, which was not done. (*C. C. P.,* Sections 1981, 1982.)

Therefore, no compliance with the law was legally established by plaintiff as to the assessment levied or demand for the tax in compliance with law.

V.

THAT THE QUANTITY OF DISTILLED SPIRITS PRODUCED, UPON WHICH THE TAX WAS ASSESSED, WAS NOT ESTABLISHED.

Upon the trial, the evidence introduced to establish the number of proof gallons of brandy distilled was uncertain, to say the least, as was the amount or proof of the brandy lost.

In this connection, it is most significant that plaintiff's witness admitted (R. 117) that he had not included in his computation, any distilling material or any brandy that might have been contained in the overflowing tank No. 1, having a capacity of 398.34 gallons the so-called over-flow tank having a capacity of 80 gallons and the singling tank having a capacity of 104 gallons, whereas a witness for defendant testified (R. 170, 171) that there were two distilling material tanks and two brandy receiving tanks located in the distilling premises, also, a singling tank, charging tank, and an overflow tank, making seven in all.

Moreover, plaintiff's witness admitted that he had sent a record to the Internal Revenue Department that the proof of the brandy contained in Tank No. 2 was 54 proof (R. 113) although he had previously testified (R. 105) that the proof of the spirits was about 55.

He was certain that he gauged the brandy but he would not say as to the exact proof (R. 113). When first examined, he testified (R. 96) "the brandy receiving Tank No. 2 was filled to capacity with liquid that was a mixture of brandy and water. Receiving Tank No. 1 was about half full of water. There was no evidence of alcohol in that, and the sump on the floor of the distillery contained a mixture of water and wine sediment and brandy, with some alcohol in it." Later (R. 118) he testified that the dirt floor of the distillery was damp, but admitted (R. 119) that neither he nor anyone else, to his knowledge, had made a test to determine whether there was any brandy there. Later upon direct examination (R. 104, 105) and upon cross-examination (R. 113) this witness stated that the proof of the brandy in Tank No. 1 was 20 proof gallons; also that there was only one sump containing liquid (R. 119), although after refreshing his recollection by reference to the plans of the winery he stated (R. 129) that there were two sumps separated by a concrete wall with an inter-connecting pipe-line, at which time defendants requested that he produce the plans of the winery in order to establish or contradict the information furnished by the witness (R. 130).

Plaintiff's Exhibit No. 5 (R. 20-21) purports to be a demand upon defendants for payment of taxes appearing upon the assessment roll of the District, namely, "tax assessed on 1619.56 proof gallons of brandy lost through negligence on Fruit Distillery Premises No. 306 *on Dec. 26, 1936*, @ $2.00 per gallon, which appears on Collector's March 1937 List, page

504/2 $3,239.00, together with penalties as prescribed by law and together with interest thereon until paid as provided by law". On the other hand, the assessment certificate, Plaintiff's Exhibit No. 1 (R. 10-13), shows that the tax was on 1619.56 pg Bdy (Lost through negligence), *12-26 and 27-36.*

A witness for defendants (R. 170-177) testified regarding the number of tanks in the distilling premises and the capacity thereof and the use and operation of these tanks, from which it is evident that in the absence of the gauging of the distilling material and brandy in these tanks and sump by the gauger for plaintiff, it would be absolutely impossible to ascertain and determine the quantity of distilling material, distilled spirits or brandy in the distilling premises on either December 26, 27 or 28, 1936; hence, the quantity of distilled spirits produced upon which the tax was assessed was not established by the evidence nor did plaintiff sustain the burden of proof in this connection.

VI.

THAT THE DISTRICT COURT ERRED IN ADMITTING EXHIBITS WITHOUT PROPER FOUNDATION HAVING FIRST BEEN ESTABLISHED THEREFOR.

Reference to the foregoing arguments is made in support of the conclusion that the District Court erred in admitting exhibits without proper foundation having first been established therefor.

VII.

THAT THE DISTRICT COURT ERRED IN REFUSING TO ORDER THE PRODUCTION OF THE DISTILLERY PLANS FOR THE PURPOSE OF CROSS-EXAMINATION OF A WITNESS WHO HAD TESTIFIED REGARDING THE OPERATION OF THE DISTILLERY INCLUDED THEREIN.

In view of the testimony of the witness for plaintiff that he was on the distillery premises on December 28 (R. 93), the fact that his testimony was objected to on the ground that he had not been qualified as an expert (R. 100) but which testimony was admitted by the Court over the objection of defendants as the witness said that he was familiar with the general situation at the distillery and had made an examination of the still at that time and both before and since (R. 100) although on cross-examination he stated: A. I do not think I said I was entirely familiar with the distilling premises. I was not familiar with the winery and distillery, and so far as I know that was no more than the second time I visited the premises". (R. 127), as well as the further fact that he was permitted to testify regarding the distillery premises and its operation (R. 115 et seq.), defendants were entitled to have the plans, upon which his testimony was based, produced and made available for purposes of cross-examining him in order to establish his credibility or lack of credibility as an expert witness.

As it was apparent that the witness had refreshed his memory by reference to these plans (R. 128), defendants were entitled to have these plans produced for purposes of cross-examination (C. C. P. 2047) and it was error to refuse this request.

VIII.

THAT THE DISTRICT COURT ERRED IN ADMITTING HEARSAY EVIDENCE WHICH WAS NO PART OF THE RES GESTAE.

Over the objection of defendants, a witness of plaintiff was permitted to testify regarding a purported conversation that occurred allegedly on the morning of December 28, 1936, around 10:00 A.M. with one Joe Renteria (R. 96 et seq.) over the objections of defendants that no foundation had been laid for the introduction of such evidence.

It is admitted that even though this witness then testified that "Practically the same conversation was held later in Mr. Groci's presence", such conversation ostensibly having been repeated by Joe Renteria again, that all such conversation was hearsay and not a part of the res gestae in that all such asserted statements or declarations were made an appreciable time after the accident and resulting loss had occurred.

As is pointed out in *Williard v. Valley Gas & Fuel Co.,* 171, Cal. 9, such a statement was not part of the res gestae and should have been excluded because relating to something that had previously occurred and not while the accident was occurring. (*Innis v. Steamer Senator,* 1 Cal. 459; *Williams v. S. P. Co.,* 133 Cal. 550; *Luman v. Golden Ancient Channel Mining Co.,* 140 Cal. 700; *Bandy v. Sierra Lumber Co.,* 149 Cal. 772; *Kimic v. San Jose,* 156 Cal. 379; *Burgesser v. Bullocks,* 190 Cal. 673; *Cal. Juris.,* Vol. 10, p. 1115, Sec. 343)

IX.

THAT, AS THE INFORMATION CONTAINED IN PLAINTIFF'S EXHIBIT NO. 4 WAS ESTABLISHED TO HAVE BEEN BASED UPON INCORRECT INFORMATION SUPPLIED BY PLAINTIFF, IT WAS ERROR FOR THE DISTRICT COURT TO ADMIT SUCH EXHIBIT IN EVIDENCE.

Over the objection of defendants, the Court permitted witnesses for plaintiff to testify regarding plaintiff's Exhibit No. 4 (R. 65, 82-83, 85-96) and to admit said Exhibit No. 4 in evidence over the objections of defendants and denied the defendants' motion to strike said exhibit from evidence after defendants' witness G. B. Antonini had testified (R. 145-160) that the information therein contained had been furnished to him by plaintiff's employee and witness A. F. Bulfinch, also, that he did not know who dictated or typed the letter although he signed it after he was told to do so (R. 156) and he believed the information to be true when he signed it as it was represented to him that way. However, he testified (R. 148) that his duties with respect to the Livermore Winery were in San Francisco and that he was not at the winery on December 26, 27, 28 or 29, and that he was not familiar with the situation at all (R. 150). Further, he testified that he did not authorize anybody to dictate the letter for him (R. 151) but that he signed it upon the advice of Mr. Mayhew (R. 152).

Under these circumstances, it was error for the Court to permit the introduction of plaintiff's Exhibit No. 4 in evidence and to deny defendants' motion to strike said exhibit from the evidence because

the statements therein contained were admittedly made in reliance and based upon incorrect information furnished to G. B. Antonini in connection with which he had no knowledge. (*Gulart v. Azevedo,* 62 Cal. App. 108, 113)

CONCLUSION.

In view of the law and the evidence defendants submit that the decision and judgment of the trial Court was erroneous in the particulars noted in the Specification of Errors and should be reversed and remanded to the District Court to enter Findings of Fact and Conclusions of Law in accordance with the evidence and the law covering the issues involved, issuing thereafter a judgment in conformity therewith in favor of defendants and against plaintiff together with costs of suit and appeal incurred in connection therewith.

Dated, San Francisco,
March 6, 1946.

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